DATE: JULY 23, 1992

CASE NO.: 92-TLC-13

In the Matter of

RIGGS FARM
(Ms. Anilkumar S. Keshiah)

Employer

Appearances: David C. Venable, Esq.
For the Employer

Annaliese Impink, Esq.
For the Government

Before: LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

This is an expedited administrative review requested by the Employer, Riggs Farm, of the denial of its applications for four temporary alien agricultural labor certifications by the Department of Labor Regional Administrator ("RA"). The matter arises under the Immigration and Nationality Act at 8 U.S.C. § 1101 et seq. ("Act"), as amended by the Immigration Reform and Control Act of 1986, and the regulations promulgated thereunder at 20 C.F.R. §§ 655.90-655.113. Twenty C.F.R. § 655.112(a)(2) provides that this Decision and Order constitutes the final decision of the Secretary of Labor.

Under the Act, an employer must certify to the Secretary of Labor that the employment of aliens in seasonal or temporary positions will not have an adverse affect on the wages and working conditions of U.S. workers and that there are insufficient U.S. workers who are willing, able, and qualified for the job. 8 U.S.C. § 1188(a)(l).

Procedural History

On July 6, 1992, the RA denied the Employer's request fur "H-2A temporary alien agricultural labor certification for four (4) job opportunities." Appeal File (AF) 4, By letter dated July 10, 1992, the Employer requested an expedited administrative review of the case by an administrative law judge. AF 1. The Appeal File was received by this office on July 16, 1992.

Scope of Review

Twenty C.F.R. § 655.112(a) governs the processing of a request for expedited administrative review and provides that a judge (or panel of judges) review the record "for legal sufficiency" and issue a decision within five working days after receipt of the Appeal File. 20 C.F.R. § 655.112(a). The regulation further provides that "[t]he administrative law judge shall not remand the case and shall not receive additional evidence." 20 C.F.R. § 655.112(a). As a result, evidence submitted by the Department of Labor and the Employer, which was not considered by the RA, cannot be considered on review.

Statement of the Case

On June 22, 1992, the Employer filed a modified ETA-750 application seeking to fill the position of farm worker. AF 25. The job duties are as follows:

> Worker may plant, will cultivate and harvest vegetables. Plants may be removed from beds by hand for transplanting in fields. Workers will weed vegetable rows, give them water accordingly. They needed (sic) to make special shades (sic) to grow delicate vegetables to climb the fence. To handle very delicately.

AF 25. The position requires a 40 hour work week from 7:30 a.m. to 4:30 p.m. at $5.39 per hour. The term of employment is from July 16, 1992 through October 30, 1992. AF 25. Special requirements for the job include the following:

> Worker should be in good physical condition, able to work in temperatures from 40 degrees to slightly over 100 degrees.
>
> Worker should have no allergies to noxious, (sic) plants or insect control sprays.

AF 25.

By letter dated June 23, 1992, the RA advised the Employer that its modified application was acceptable for consideration because it contained conditions of employment which would not adversely affect U.S. workers similarly employed. The RA also determined that the Employer's positive recruitment plan was acceptable. AF 21. By letter dated June 30, 1992, the Employer submitted its recruitment results. AF 13-20.

By notice dated July 6, 1992, the RA denied the Employer's request for four temporary alien labor certifications. AF 4-6. In his letter, the RA concludes that the Employer unlawfully rejected U.S. applicants Garcia, Lucas and Ramirez on grounds that they did not speak English. AF 4. The RA further advised that the Employer failed to document lawful, job related reasons for the rejection of U.S. applicants Kennedy, Hutzell, Gaitan, Grabenstein and Vogel. AF 6. Finally, the RA determined that the Employer had failed to document any recruitment efforts through the Telamon Corporation, and Motivation, Education and Training, and the

Commonwealth of Puerto Rico in New York and Philadelphia as required by the approved recruitment plan. AF 5.

Discussion and Conclusions

The regulations at 20 C.F.R. § 655.103(c) provide that "[n]o U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason . . .." 20 C.F.R. § 655.103(c). The RA, in this case, challenged the rejection of U.S. applicants Garcia, Lucas, Ramirez, Kennedy, Hutzell, Gaitan, Grabenstein and Vogel as based upon unlawful, non-job related reasons.

The Employer rejected applicants Garcia, Lucas and Ramirez based upon their inability to communicate in English. Citing §§ 655.102(c) and 655.102(b), the RA concluded that a requirement that the applicants speak English was "not a bona fide occupational qualification of this job" and, moreover, the requirement was not specified in the job order. AF 5. Consequently, the RA concluded that applicants Garcia, Lucas and Ramirez were unlawfully rejected.

In a memorandum to the file from the RA's office dated July 6, 1992, it was noted that, in a telephone conversation with the Employer, the Employer "asked how could she instruct the workers if they didn't understand English." AF 3. See also AF 17. Indeed, it would be impossible to communicate with these workers, even minimally, to accomplish the day-to-day tasks on the farm. To require that an employer hire workers who are unable to communicate in English, at least when no worker who could translate was made available for employment with the three Spanish speaking workers, is oppressive. Therefore, based upon the facts of this case, the RA erred in concluding that the rejection of applicants Garcia, Lucas and Ramirez was unlawful.

The Employer's June 30, 1992 recruitment report states that applicants Hutzell and Kennedy (referred to as "Kennedy Charlie" by the Employer) did not show up for their interviews. AF 13.

However, the record contains scant documentation to support the rejection of applicants Gaiton, Grabenstein and Vogel. Specifically, there is no evidence proffered by the Employer to explain the rejection of these applicants who were referred to the Employer, along with eight other applicants, by the Maryland Office of Employment Services ("MSES"). AF 7. The job order from the MSES contains the following handwritten notations of unknown origin beneath the list of 11 applicants referred:

7 - Emp(loyer) said not qualified
5 - Hired (worked two days and quit)
3 - Refused job.

AF 7. These comments were not associated with any of the applicants in particular.

By letter dated July 10, 1992, an assistant to counsel for the Employer asserted that applicant Grabenstein "never showed up for work" and applicant Gaitan was hired but left the job shortly thereafter. AF 1. These assertions are not supported by any documentation in the record and neither counsel nor counsel's assistant can serve as a fact-witness in this matter. Moreover, no mention is made regarding applicant Vogel.

It is concluded, therefore, that the Employer has failed to establish that applicants Grabenstein, Gaitan and Vogel were lawfully rejected.

In addition, the RA determined that the Employer failed to contact four organizations as part of the positive recruitment process in violation of §§ 655.105(a) and (d). The RA required contact with Telamon Corporation as well as Motivation, Education and Training and the Commonwealth of Puerto Rico in New York and Philadelphia. AF 22. The record contains no documentation regarding contact with these organizations. Moreover, the Employer's request for administrative review fails to address this dispositive issue.

It is determined, therefore, that the Employer failed to complete the positive recruitment process as required by 20 C.F.R. § 655.105.[1]

ORDER

The Regional Administrator's denial of temporary agricultural labor applications is AFFIRMED.

Lawrence Brenner
Administrative Law Judge

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[1] If the evidence submitted by the Employer and the Solicitor, on behalf of the RA, after issuance of the RA's denial was considered, some, but not all, of the deficiencies noted in the recruitment process would have been cured. Specifically, there is a letter dated July 2, 1993 (sic) from applicant Gaitan wherein he stated that he voluntarily left the job. There is also a letter from the Telamon Corporation, dated July 10, 1992, stating that they have no workers to refer. However, other late evidence in the record reveals continued unsuccessful attempts by the state employment agencies to refer available U.S. workers as well as unsuccessful attempts at contact by U.S. workers, by telephone or in person, which reinforces the RA's conclusion, based on timely submitted evidence, that the Employer failed to engage in a reasonable, positive recruitment of U.S. workers.